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Supreme Court of the United States

October Term, 1961

No. 746

GRAZIANO DIMINICH,

Petitioner,

against

P. A. ESPERDY, District Director of Immigration and Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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Opinions were delivered by both the District Court and the Court of Appeals. Neither has as yet been reported. They appear respectively at pages 17 and 19 of the Appendix.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 U. S. C. and Rule 19(b) of the Revised Rules of this Court.

Proceedings Below

(References are to the pages of the appendices below unless otherwise noted. The legend "P" will be used to refer to the appellant's appendix below; the legend "R" will be used to refer to the respondent's appendix below.)

Petitioner prays for a writ of certiorari to review the decree of the United States Court of Appeals for the Second Circuit, which decree was made and entered on January 15, 1962.

Petitioner last arrived in the United States at New York City on October 15, 1957 when he was admitted as a nonimmigrant crewman. On April 9, 1959, a warrant was issued directing his deportation under Section 241(a)(2) of the Immigration and Nationality Act of 1952 on the ground that he had remained in the United States for a longer time than permitted. Petitioner was ordered deported to Yugoslavia.

On April 10, 1959, petitioner applied for relief, to have his deportation to Yugoslavia withheld under Section 243(h) of the Act, claiming that he would be physically persecuted within the meaning of said Act. On April 30, 1959, this application was denied by a Special Inquiry. Upon appeal to the Regional Commissioner, the appeal was denied on May 27, 1959. The opinions of these administrative officers appear respectively at pages 19 to 47 of our Appendix.

Petitioner thereafter commenced an action for a judicial review of the order denying his application to have his deportation withheld. Defendant moved for summary judgment dismissing the complaint under Rule 56 of the Federal Rules of Civil Procedure. The United States District Court for the Southern District of New York (Lloyd F. MacMahon, D. J.) granted the motion and a final order and judgment were entered on July 5, 1961.

Petitioner appealed to the Court of Appeals; pending the appeal, a stay of deportation was granted on July 17, 1961. The Court of Appeals affirmed the order and judgment of Judge MacMahon on December 29, 1961.

The mandate of the Court of Appeals issued on January 15, 1962. Thereafter petitioner moved for a stay of deportation. The Court of Appeals on January 26, 1962 recalled its mandate and stayed the petitioner's deportation for thirty days from the date of said order and thereafter as provided in Rule 28(c)(2) of said court. The opinion of the Court of Appeals was rendered on December 29, 1961.

Questions Presented for Review

Both before the District Court and the Court of Appeals the questions presented were:

(a) Whether the construction by the Immigration Service of the words "physicial persecution" contained in Section 243(h) of the Act and used as the criteria for the decision on petitioner's application for a stay of deportation constituted an error of law.

(b) Whether, if the answer to the above is in the affirmative, the ruling of the respondent in denying a stay of deportation was so clearly wrong as to constitute a denial of due process.

(c) Whether the action of the respondent in failing to afford petitioner the opportunity to apply for relief as a refugee escapee was arbitrary and capricious and otherwise not in accordance with law so as to visit cruel and inhuman punishment on the petitioner in violation of the Constitution.

Judge MacMahon in the District Court stated in his opinion that the hearing accorded petitioner under Section 243(h) of the Act "was in all respects fair and in compliance with procedural due process." By way of dictum he stated that if the phrase "physical persecution" was not limited to death, torture, battery or confinement but included economic sanction as well, the record demonstrated that petitioner had failed to prove that he would be subjected to economic sanction. The Court concluded that therefore the Attorney General had not "misinterpreted the law by applying too restrictive criteria to the phrase 'physical persecution'." Finally the Court said that petitioner having failed to submit an application for the issuance of a refugee escapee visa under Section 15 of the Act of September 11, 1957, the petitioner's claim that he was improperly denied refugee escapee status was untenable (Appendix, 17).

The Circuit Court unanimously affirmed the order and judgment of Judge MacMahon. In an opinion by Circuit Judge Friendly, the Court held that there was no basis for holding that the District Director was bound to advise petitioner of the possibilities open to him under the refugee escapee law.

The remainder of petitioner's arguments were rejected. No attempt will be made to summarize the grounds set forth by the Court of Appeals for its decision at this point. We will address ourselves to the decision of the Circuit Court under a heading which follows.

Constitutional Provisions and Statutes Involved

Section 243(h) of the Immigration Act of June 27, 1952 (8 U. S. C. Section 1253) provides:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

The Act of August 7, 1953, Chapter 336, popularly known as the Refugee Relief Act, contains the following definition:

> "Escapee means any refugee who, because of persecution or fear of persecution on account of race, religion or political opinion, fled from * * * other Communist, Communist-dominated * * * area of Europe * * * and who cannot return thereto because of fear of persecution on account of race, religion or political opinion."

See also the Act of August 31, 1954, Chapter 1169, Public Law 751 and Act of September 11, 1957, Public Law 85-316, both similarly worded.

Amendment V—Constitution of United States:

> "No person shall * * * be deprived of life, liberty or property, without due process of law."

Amendment VIII—Constitution of United States:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Statement of Case

The petitioner was born on January 11, 1938 at San Lorenzo di Albona, then in Italy, now in Yugoslavia (R32a). "Following his preliminary education, he secured employment on Yugoslav vessels navigating in the Mediterranean and * * * during such employment he was continuously indoctrinated in communism and Godlessness. In September, 1956 he escaped from his vessel at an Italian port and surrendered himself to the Italian authorities. He requested political asylum in Italy. Following an investigation, he was recognized as a political refugee from Yugoslavia and was issued a document to that effect as well as an international passport. Thereafter he obtained employment on a Danish vessel, the steamship Anna Maersk, which came to the United States on two occasions, his last arrival occurring on October 15, 1957," (R32a) on which date he was admitted as a nonimmigrant crewman. On April 9, 1959 a warrant was issued directing his deportation under Section 241(a)(2) of the Immigration and Nationality Act on the ground that he had remained in the United States for a longer time than permitted (R31a). On April 10, 1959 the applicant applied for a stay of deportation under Section 243(h) of the Act. He alleged that he feared persecution in Yugoslavia on account of his religious and political beliefs (R231a). He alleged that while in the United States he had on numerous occasions expressed his opposition to communism and totalitarianism in general; that if he was returned to Yugoslavia he had every reason to believe that he would be severely punish, imprisoned and maltreated because he escaped from Yugoslavia and expressed his views against the communist regime (R32a).

Petitioner showed that he was a Catholic and had always attended the Catholic Church but that during his employment on Yugoslav vessels he attended church only when no one saw him because he was afraid he would lose his job if discovered attending church services. He also claimed that the communists had killed an uncle of his in 1949 because of said uncle's opposition to the communists (R33a).

The Special Inquiry Officer who heard the application held that "the government of Yugoslavia does not persecute the ordinary individual solely because he criticizes the communist regime." He went on to say: "It may be assumed that the applicant would be punished in Yugoslavia for deserting his vessel in 1956, but there is no indication that such punishment would be cruel or inhuman" (R34a). It was recommended that the application to withhold deportation to Yugoslavia be denied "on the ground that he had not established that he would be subject to physical persecution if so deported" (R 35a). The Regional Commissioner adopted the foregoing recommendation holding "it is not my opinion that the applicant would be subject to physicial persecution if deported to Yugoslavia" (R36a). Petitioner then commenced an action pursuant to the Immigration and Nationality Act, the Administrative Procedure Act, and the Declaratory Judgment Act for a review alleging that the constitutional rights of the petitioner pursuant to Amendments Five and Eight of the Constitution of the United States had been violated. Petitioner contended that a stay of deportation under Section 243(h) of the Act should have been granted to him and that furthermore, he had been denied the right to relief under Section 15 of the Act of September 11, 1957 which would have permitted him to remain permanently in the United States. He contended that under the facts alleged he was denied due process; that the action of the respondent was arbitrary and capricious and otherwise not in accordance with law; that he was not afforded the right of a fair hearing

and that in ordering him deported to Yugoslavia, the act of the respondent was unlawful and unconstitutional as visiting cruel and inhuman punishment on him. The petitioner sought to enjoin the respondent from deporting him and sought a declaration from the court holding respondent's acts unlawful and requested the order of deportation be set aside. When the respondent moved in the District Court for summary judgment dismissing the complaint petitioner showed that approximately one year before the decision had been made by the Special Inquiry Officer denying petitioner's application for relief under Section 243(h), the Commissioner of Immigration had fixed certain criteria for the guidance of the Immigration Service in determining 243(h) applications. These criteria have become known under the title of that administrative decision as *Matter of Kale*. It was stated there:

> "The subject has stated that he might be punished for this desertion upon return to Yugoslavia. Such a possible punishment is not the physical persecution contemplated by the statute. Physical persecution contemplates incarceration or subjection to corporal punishment torture, or death based usually on one's race, religion or political opinions. Conviction followed by imprisonment for crimes cognizable as such under generally recognized civilized juridical systems is not physical persecution. Economic sanctions applied against those not members of the controlling clique in a country whose economic system is completely and rigidly state-controlled is not physical persecution." (P10a)

It was further shown in the District Court and it has not been denied, that the entire Immigration Service was informed by the Commissioner that "the decisions are to be made by your office based upon the criteria set forth in the attached order." The reference was to the *Kale* decision (P12a). It was alleged that the foregoing criteria was the basis of the decision made in this case and that the same was improper and illegal.

It was also alleged that all during the deportation proceedings and the hearing pursuant to Section 243(h), both the Government and the petitioner's former attorney were fully aware of his refugee status; that, nevertheless, petitioner was denied the opportunity to obtain refugee escapee status under Section 15 of the Act of September 11, 1957; that as a matter of law, the Government was bound to take appropriate action to assist the petitioner in obtaining said refugee escapee status and to prevent his return where persecution awaited him (P8a *et seq.*).

Argument

The chief argument in behalf of the petitioner is aimed at the words "physical persecution" contained in Section 243(h). With all due deference to the courts below it is respectfully submitted that neither court grasped the significance of our argument. Our logic is as follows:

(a) The Commissioner of Immigration has set certain criteria for judging what constitutes "physical persecution". These criteria were synthesized in *Matter of Kale*, and constitute the administrative interpretation of the statute. In the words of *Kale* "physical persecution contemplates incarceration or subjection to corporal punishment, torture or death based usually on one's race, religion or political opinions."

(b) We submit that the phrase "physical persecution" contained in Section 243(h) invites judicial interpretation and that statutory construction is a matter of law. *Norton* v. *Warner Co.*, 321 U. S. 565 (1944). We further say it is for the courts to ascertain the meaning of the statute. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, 508 (1951). This Court has done so in immigration cases. *McGrath*

v. *Kristensen*, 340 U. S. 162 (1950); *Fong Haw Tan* v. *Phelan*, 333 U. S. 6 (1948). We submit that a judicial interpretation of the words "physical persecution" will lead to a rejection of the administrative interpretation that incarceration or subjection to corporal punishment, torture or death is the criteria. We submit that the history of the law and the legislative history dealing with this problem clearly indicates that the words "physical persecution" judicially means "fear of persecution".

(c) It, therefore, follows that if the criteria used by the Immigration Service in the 243(h) hearing was improper, petitioner was denied a fair hearing and due process of law.

This is the sum and substance of the first point which was presented to the courts below. Section 243(h) is a parole device. In the Immigration Service parole has been an administrative device of long standing. As far back as 1946, the Board of Immigration Appeals said:

> "Perhaps the correct test (in employing the device of parole) is whether the execution of the exclusion order would react so unfavorably or unjustly to the alien involved so as to require from a humane consideration some relief."

In a later case this Board said:

> "Its use is reserved only for those exceptionally meritorious cases where immediate deportation would be inhumane." *Administrative Decisions Under Immigration & Nationality Laws of the United States*, Vol. III, pp. 46, 47.

A review of the legislation dealing with refugees who cannot return to their country of origin because of race, religion or political opinion clearly shows that the test for granting asylum to such refugees has always been the "fear of persecution."

The design of all of this legislation by Congress was to create one class of persecutees. We submit that Congress had no intention of creating two different classes—one which could only be granted asylum if they proved "incarceration or subjection to corporal punishment, torture or death based usually on one's race, religion or political opinions" and the other to be granted asylum if they showed "fear of persecution on account of race, religion or political opinion."

Both the Immigration Service and the courts tested the "fear of persecution" mandate of Congress. It has been held that although the criteria are essentially subjective, if the alien's proof has a seed of reality and as asserted in good faith, deportation should be stayed. *Cheng Fu Sheng* v. *Barber*, 269 F. 2d 497 (C. A. 9, 1959).

Ever since *Dolenz* v. *Shaughnessy*, 200 F. 2d 288, cert. denied, 345 U. S. 780 (Justices Black and Douglas voting for review), the words "physical persecution" have been the subject matter of both administrative and judicial decisions. These cases involved, in the main, aliens ordered deported to Yugoslavia and China. The writer of this brief is of the belief that in the United States District Court of New York the fate of at least twenty Yugoslavians revolves around the interpretation of these words. Various means have been employed to attack the statute. We have chosen to seek a judicial interpretation of the words of the statute.

Recently in the case of *Dunat* v. *Holland*, — F. 2d — (3 Cir. 1961), that court was faced with a case similar to the instant one (App. 28). There the Immigration Service found that "the fact that the applicant might be denied employment for church membership or for failure to join the Communist Party is likewise not within the import of the term 'physical persecution.'" The Court held that this was an erroneous interpretation of that phrase and stated that there was no basis for thinking that Congress gave

the Attorney General the exclusive right to interpret the statute. It was there held:

> "Here, the Attorney General defined this phrase incorrectly by emphasizing, at the expense of all else, the means used to bring about a result, rather than the result itself. To belittle economic sanctions regardless of their impact was, we think, to bypass the realities of everyday life. The statute does not concern itself with the manner in which physical persecution is inflicted, so long as that is the net effect of the forces or the circumstances that the Yugoslavian government will impose. Economic sanctions that may tend to lead to social ostracism, or deny one an opportunity to obtain and enjoy some of the social niceties and physical comforts certainly is not within the ambit of that phrase. However, there is no basis for thinking that 'physical persecution' requires or even connotes the use of intense physical force applied to the body with all the dramatics of the rack and wheel. The denial of an opportunity to earn a livelihood in a country such as the one involved here is the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual. The result of both is the same, and it is one that Congress, motivated by the humanitarian instincts that have always characterized our conduct and that of our civilization, certainly hoped to avoid when subsection 243(h) was enacted."

Dunat was reargued *in banc*. A copy of the opinion on reargument which is not reported is made part of the Appendix hereof (App. 46).

It is to be noted that on reargument, although there was an equal division among the members of the bench as to full agreement with the views expressed by the majority of the panel which heard the case originally, it was unanimously held that economic proscription so severe as to deprive a person of all means of livelihood might amount to physical persecution. It is further to be noted that for

the first time the government retreated from its test of "incarceration or subjection to corporal punishment, torture or death" and conceded that economic sanctions could be "physical persecution". With due deference to the Third Circuit, we voice our disappointment—not in what was done in *Dunat*, but in what was not done. Having been presented with the opportunity of interpreting the words "physical persecution", the Court merely included economic sanctions within its meaning thus leaving open the entire question of what these words mean. We submit that when an applicant under 243(h) seeks relief, due process compels the government to fix the criteria which must be met in order to obtain the relief. The criteria may not be arbitrary, capricious, improper or unlawful. Not until there is a clearly defined interpretation of the section by the courts can there be a fair disposition of such an application. Upon the facts of our case and upon the concession made by the government in *Dunat*, it clearly appears that the petitioner here did not receive a fair hearing.

We argued below that because the criteria used by the government was improper the Court should enjoin the deportation order. We further argued that should the Court be reluctant to do so "the case be remanded to the Special Inquiring Officer with instructions to afford plaintiff the opportunity of being heard in accordance with the criteria set by this Court."

The effect of the argument resulted in a commendation for "the zeal and ingenuity of counsel in making it." This was faint praise indeed, for the Court below, in rejecting the argument, clearly showed that it misunderstood petitioner's reasoning. The Court would have had petitioner claiming that he would be subject to "economic sanctions" and that, therefore, the government having failed to include "economic sanctions" as part of the criteria, we were entitled to a new hearing. Because of

the weakness of the record created by petitioner's former attorney, the Court refused a new hearing, as being "too theoretical and remote".

But, we never claimed that petitioner would be subject to "economic sanctions" alone. We claimed that in the absence of "fear of persecution" as part of the criteria to be used by the government, petitioner had been denied due process. We argued that just as a Court will not substitute its judgment for that of an administrative body, fairly arrived at, a Court may not judge what the judgment of an administrative body would under new set of criteria. Thus, the necessity for remand.

In this case and in *Dolenz* the Attorney General decides the question of "physical persecution" on matters outside the record and on matters of a questionable nature which are never disclosed to the applicant. We have not touched upon this phase of the case. Our sole comment is the language of Judge Clark in *Dolenz* where he said that the foregoing "makes a cruel hoax of the announced relief".

The record discloses that from the very outset of the deportation proceedings the government knew that this petitioner was a political refugee from Yugoslavia. Yet he was never given the opportunity to file for an adjustment of his status as a refugee escapee pursuant to the provisions of Section 15(a) 3) of the Act of September 11, 1957. The United States characteristically has always opened its arms to those who are persecuted. The United States does not stand with folded arms and reject those who are persecuted merely because, through their ignorance or through the failure of counsel, they have failed to ask for asylum. The granting of asylum should not be and is not an adversary proceeding.

The government has argued that the failure of this petitioner to apply for relief bars him from relief. With this stand we differ. *See McLeod* v. *Peterson*, 293 F. 2d 180 and *Bridges* v. *Wixon*, 65 Supreme Court, 1443.

It is respectfully submitted that this Court grant certiorari so that Section 243(h) of the Immigration and Nationality Act of 1952 may be judicially interpreted not only so as to grant this petitioner his constitutional rights but also to assure all those in a similar position that they will be dealt with fairly under existing law.

Finally, we most respectfully pray that certiorari be granted because the Courts of Appeals of the Second and Third Circuits are not in agreement on the law dealing with Section 243(h), which is an important question of federal law which has not been, but should be settled by this Court.

Witness the division of the Third Circuit as to "the views expressed by the majority of the panel which first heard this case." Witness the clash between what the Third Circuit believed the position of the Attorney General to be as to economic sanctions "during administrative consideration" of its 243(h) case (App. 47), and the manner in which the Second Circuit dealt with the same question (App. 25).

But as pointed out above, the question here is not how "economic sanctions" fits in the scheme of 243(h). The Second Circuit, in effect, says that "physical persecution" now means "incarceration or subjection to corporal punishment, torture or death" plus "economic sanctions." The Third Circuit, in its entirety, would seem to agree with this view, except that four members of that Court went farther and held that the statute "does not concern itself with the manner in which physical persecution is inflicted, so long as that is the net effect of the forces and circumstances that the Yugoslavian government will impose."

In view of the long history of our country in aiding those who are persecuted because of race, religion or

political belief and, in particular, the legislation of Congress which followed 243(h), which deals with refugees, we condemn the vagueness of both above decisions and most respectfully pray that 243(h) be clearly defined, so that the criteria to be used by the Immigration Service in deciding these applications be fixed so as to afford all refugees from Communist terror the opportunity of obtaining asylum.

Respectfully submitted.

ALFRED FEINGOLD,
Counsel for Petitioner.

APPENDIX

Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MACMAHON, *D. J.*

This is a motion by defendant for summary judgment. The facts are not in dispute (Rule 9(g), General Rules, S. D. N. Y.).

The administrative record clearly establishes that the hearing accorded plaintiff upon his application for a withholding of his deportation to Yugoslavia under Section 243(h) of the Immigration & Nationality Act was in all respects fair and in compliance with procedural due process. The withholding of deportation in cases where the alien claims asylum under Section 243(h) rests wholly in the administrative judgment and opinion of the Attorney General or his delegate as to whether the alien would be subjected to physical persecution if deported to the designated country. The court may not substitute its judgment for his especially when, as here, the decision is essentially one in the political realm of foreign policy. *U. S. ex rel. Dolenz v. Shaughnessy*, 206 F. 2d 392 (2 Cir., 1953). Nor is there any merit to plaintiff's contention that the Attorney General acted arbitrarily, capriciously or in disregard of the law.

Assuming, *arguendo*, that the phrase "physical persecution" is not limited to death, torture, battery or confinement, but includes economic sanction as well (*Dunat v. Holland*, — F. 2d — (3 Cir. May 1961)), the record demon-

strates beyond question that plaintiff wholly failed to prove that he would be subjected to economic sanction because of his religion if he were deported to Yugoslavia. On the contrary, the record supports the conclusion that he and his immediate family did practice his faith without economic sanction while living in Yugoslavia. Accordingly, there is no basis whatever for the plaintiff's claim that the Attorney General misinterpreted the law by applying too restrictive criteria to the phrase "physical persecution."

Plaintiff's other contention, that he was improperly denied refugee-escapee status, is untenable. There is nothing in the record to show that plaintiff submitted an application for issuance of a refugee-escapee visa under Section 15 of the Act of September 11, 1957.

Accordingly, defendant's motion for summary judgment is granted.

So ordered.

Dated: New York, N. Y.
July 5, 1961

Lloyd F. MacMahon,
U. S. D. J.

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 90—September Term, 1961.

(Argued November 29, 1961 Decided December 29, 1961.)

Docket No. 27086

GRAZIANO DIMISICH,

Plaintiff-Appellant,

v.

P. A. ESPERDY, as District Director of the Immigration & Naturalization Service, New York District,

Defendant-Appellee.

Before: CLARK, FRIENDLY and KAUFMAN, *Circuit Judges*.

Appeal from an order of the District Court for the Southern District of New York Lloyd F. MacMahon, *J.*, granting motion of District Director of Immigration for summary judgment in an action by Yugoslav seaman to stay deportation. Affirmed.

ALFRED FEINGOLD, New York, New York, for Plaintiff-Appellant.

ROY BABITT, Special Assistant United States Attorney (ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York), for Defendant-Appellee.

FRIENDLY, *Circuit Judge*:

Diminich, a Yugoslav seaman who entered the United States illegally, appeals from an order of Judge MacMahon in the District Court for the Southern District of New York, which granted a motion for summary judgment by the District Director of the Immigration and Naturalization Service in an action to annul an order refusing to withhold deportation. The order resulted from an application for relief under § 243(h) of the Immigration Act of 1952, 8 U. S. C. § 1253, which authorizes the Attorney General "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." A Special Inquiry Officer of the Service, who had heard Diminich, recommended denial, and the Regional Commissioner for the Northeast Region, to whom the Attorney General has delegated his authority, 8 C. F. R. § 243(b)(2), followed that recommendation.

Before addressing ourselves to the issues raised with respect to § 243(h), we shall rule on an alternative contention based on § 15(a)(3) of the Act of September 11, 1957, 71 Stat. 643, which authorizes consular officers to issue certain non-quota immigrant visas remaining from those authorized by the Refugee Relief Act of 1953, 50 U. S. C. App. §§ 1971a-i, to "refugee-escapees," defined as including "any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist, Communist-dominated, or Communist-occupied area . . . ." as expanded by regulations, 8 C. F. R. § 245.1, permitting District Directors, upon application, to adjust the status of certain aliens under that section without the necessity of departure from the country if the State Department's Office of Refugee and Migration Affairs finds the alien qualified and allocates a visa. Although Diminich made no application

under the 1957 Act; he contends that the District Director was bound to advise him of the possibilities that might, or might not, be open thereunder. We find no basis for so holding; and the Regulation has now been amended so as not to apply to crewmen. So we return to § 243(h).

Diminich was born January 11, 1938, at San Lorenzo di Albona, then in Italy, now in Yugoslavia. He began work as a seaman late in 1955. He deserted his vessel in Italy in November, 1956, avowedly in protest against being urged to attend Communist meetings on board and also for fear "they would put me ashore—out of work, because they didn't like anybody to go to church"; he remained in refugee camps in Italy until the summer of 1957, when he shipped on the "Anna Maersk," a Danish vessel. This he deserted on October 15, 1957, in New York, allegedly for the same reasons as his previous desertion in Italy. He was apprehended on April 2, 1959; a warrant of deportation, a petition under § 243(h), and a hearing swiftly followed.

At the hearing before the Special Inquiry Officer, Diminich testified that neither he nor any member of his family in Yugoslavia had been arrested "or in trouble with the authorities" since 1945 when an uncle was killed, allegedly "because he was against Communism"; however the authorities "made difficulties for me inasmuch as they wanted me to join the Communist Party while I was there and I wouldn't do that; and when I was at home and I wanted to go to Mass they prevented me from doing so." He feared that if he were to return to Yugoslavia, he would be imprisoned, for "perhaps two years," "for the fact that I left and deserted my vessel and that proves that I am against Communism." On the other hand, he admitted that he was never deprived of an opportunity to earn a living in Yugoslavia despite his allegedly known anti-Communist views and religious devotion, and that his father is employed. The Special Inquiry Officer concluded that the

application should be denied for lack of proof, and the Regional Commissioner for the Northeast Region, considering the evidence at the hearing "and other pertinent evidence and available information," so ordered.

If this were all, the case would not differ significantly from other deportation cases of Yugoslav seamen where the evidence has been held insufficient to warrant overturning the determination of the Attorney General or, more realistically, of his delegate, *Jay* v. *Boyd*, 315 U. S. 345 (1956), to whom Congress has confided discretion and who has access to information, not available to a reviewing court, against which the seaman's assertions must be weighed. See *Dolenz* v. *Shaughnessy*, 200 F. 2d 288 (2 Cir. 1952), cert. denied 345 U. S. 928 (1953) [under predecessor statute that "no alien shall be deported under any provisions of this chapter to any country in which the Attorney General shall find that such alien would be subjected to physical persecution"]; *Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (2 Cir. 1953); *Sunjke* v. *Esperdy*, 182 F. Supp. 599 (S. D. N. Y. 1960), appeal dismissed April 13, 1960 (2 Cir.), cert. denied *sub nom. Roncevich* v. *Esperdy*, 364 U. S. 815 (1960); *Blazina* v. *Bouchard*, 286 F. 2d 507 (3 Cir. 1961), cert. denied 366 U. S. 950 (1961). As in Blazina's case, the most reasonable inference from Diminich's testimony that he would be imprisoned on returning to Yugoslavia is that this would be punishment for desertion of his vessel, "a criminal sanction that is reconcilable with general concepts of justice." 286 F. 2d at 511. Beyond that, Diminich's claims were simply of "difficulties"; repugnant as we find such interference with religious observance and freedom of association to be, "difficulties" are not the "physical persecution" which Congress chose to make the sole factor warranting a stay of deportation,[1] see 286 F. 2d at 511, even if the Commissioner were required to credit Diminich's assertions; as he was not.

[1] The contrast in this respect between the language of § 243(h) and of § 15(a)(3) of the Act of September 11, 1957, is notable.

However, Diminich presses an additional point upon us. The background for this is the ruling of the Commissioner of Immigration in October, 1956, deferring action on the application of John Martinovich, who had made allegations of probable harsh treatment because of Catholic and anti-Communist sentiments, and of all other Yugoslav nationals making similar assertions, in order to allow the Service to collect reliable information as to conditions in Yugoslavia. This order was withdrawn on February 1, 1958, and the determinations of the Service resulting from its investigation were shortly set forth in a decision by the Assistant Commissioner of the Enforcement Division in *Matter of Kale*, Adm. Dec. A9 355 552, which, in May, 1958, was forwarded to Regional Commissioners with instructions that decisions as to all Yugoslav crewmen who had entered since 1945 and had been in Yugoslavia at some time since that date should be "based upon the criteria" stated therein. The decision stated that "various sources, including the personal observations of officers of this Service" in Yugoslavia had established that "The Government of Yugoslavia is completely under the domination and control of the Communist Party of Yugoslavia"; that "Advancement in almost any line of activity is, with few exceptions, limited to Party members"; that "The basic freedom to criticize, as we know and enjoy it, does not exist in Yugoslavia"; that "On the other hand, churches throughout the country are open for public worship and religious assembly and they are being maintained and repaired, obviously with Government permission, if not with its approval or support"; and that Yugoslavia had granted asylum to thousands of anti-Communist Hungarians. In the light of this, the Service found Kale's contentions, quite similar to Diminich's, to be without merit: Possible punishment for desertion "is not the physical persecution contemplated by the statute. Physical persecution contemplates incarceration or subjection to corporal punishment, torture, or death

based usually one one's race, religion or political opinions." As to Kale's other fears, "Economic sanctions applied against those not members of the controlling clique in a country whose economic system is completely and rigidly state-controlled is not physical persecution."

Appellant's counsel reads the *Kale* decision as a determination by the Service that complete withdrawal of all employment opportunities would not be "physical persecution,"—an interpretation of § 243(h) condemned, without disagreement on that point, in *Dunat* v. *Holland*, — F. 2d — (3 Cir. 1961), now pending before the court *in banc*, with which, in that aspect, we fully agree. Looking at the *Kale* decision alone, we would not read it as counsel does. The statement that "Physical persecution contemplates incarceration" etc. was made in answering Kale's argument as to imprisonment for jumping ship; the emphasis was on the second half of the sentence, dealing with the cause of the sanction, not on the first, describing its nature. The statement that "economic sanctions" are not physical persecution, when read in context, does not go to the extent of saying that complete withdrawal of employment opportunities would not be.

However, appellant's counsel argues that no matter how we might otherwise have read *Kale*, what happened to Dunat shows that his reading is the right one. That case, also of a Yugoslav seaman, went beyond the norm in that Dunat had testified he was sure he would get no more employment in Yugoslavia and that members of his family who refused to sign papers saying they were not members of a church had been denied "any kind of work or means of support," and a Catholic priest, who had left Yugoslavia in 1943 but said he had frequent contacts with individuals there, testified that "the government" had refused employment to "Generally everybody" who practiced their religion—whether this meant all jobs or only government jobs is not clear. The Special Inquiry Officer recommended

denial, pointing out that Dunat's family had not been physically persecuted for attending church "even though it should be established that they are denied certain types of employment," and continued "The fact that the applicant might be denied employment for church membership or for failure to join the Communist Party is likewise not within the import of the term 'physical persecution.'" The Regional Commissioner for the Southeast Region, on the basis of the transcript and "all the reliable additional information made available to me through official government channels, pertinent to the proper disposition of this application," decided there were "insufficient grounds to support a finding that the applicant would be subject to physical persecution if deported to Yugoslavia." A majority of the panel, Senior Judge Forman dissenting, held that by this action the Commissioner had, in effect, construed "physical persecution" as not including "the denial of an opportunity to earn a livelihood," which was "the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual," and directed a stay of deportation.

Appellant argues (1) that this shows the Attorney General's delegates have been following the erroneous view that denial of all employment opportunity is not "physical persecution," and (2) that established principles as to the review of administrative action, stated in *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943), require, under such circumstances, a remand for redetermination under a correct interpretation of the statute, even though his own evidence not only failed to show the likelihood of denial of all employment opportunity but rather negated it.

We cannot accept the argument, however much we commend the zeal and ingenuity of counsel in making it. The first branch would require us to agree with the majority of the panel in the Third Circuit that the Special Inquiry Officer there construed the statute as appellant contends and that the Commissioner for the Southeast Region

adopted that construction, and then attribute the view of that Commissioner to the Commissioner for the Northeast Region. We are unable to take any of these steps—much less all. The Special Inquiry Officer's reference to physical persecution contemplating the application of physical force based on race, religion or political opinion was copied from *Kale* and, like it, was directed to the argument about imprisonment for jumping ship. Although his statement that denial of employment for church membership or failure to join the party was not "physical persecution" could have been more clearly expressed, we would read it, along with the immediately preceding sentence, to refer only to denial of "certain types of employment." Even if the Special Inquiry Officer erred as appellant contends, the Southeast Regional Commissioner need not have shared the error; "the reliable additional information made available * * * through official government channels" might have convinced him that Dunat's claims were exaggerated. The only basis for a contrary conclusion, or for attributing any error on his part to the Commissioner for the Northeast Region, would be if the *Kale* decision itself had said that denial of all employment was not physical persecution; to us it did not do that.

The second branch of the argument also would take us into areas we are unwilling to enter. How far the courts in reviewing action under § 243(h) may properly consider the standard employed by the Attorney General's delegates, as distinguished from procedural fairness,[2] although they would have no means of knowing whether standards decreed by them were being applied in the light of the extra-record material the deciders necessarily use, comes sufficiently close to problems discussed in *Chicago & Southern Air Lines* v. *Waterman SS. Corp.*, 333 U. S. 102 (1948), that we must reserve that issue for a case requiring its

[2] See the two *Dolenz* decisions and *Blazina* v. *Bouchard*, cited above, and Judge [as he then was] Harlan's opinion in *Moon* v. *Shaughnessy*, 218 F. 2d 316, 318 (2 Cir. 1954).

decision. Moreover, we doubt that the *Chenery* decision ought be pressed as far as it would have to be to assist plaintiff here. There the reviewing court could not tell whether the administrative agency, proceeding on the only basis the court deemed within the agency's power, would reach the same result the agency had reached on an erroneous basis. Here the application of a correct standard to the facts as testified by Dimitnich would produce the same result already reached; in such a case remand is not normally required, see *Chae Sik Lee* v. *Kennedy*, 294 F. 2d 231 (D. C. Cir. 1961). The only ground for a contrary argument would be that here the transcript is not all there is, and that other evidence in the Government's possession might show appellant's prospects in Yugoslavia to be even worse than he thought; in the light of what was said in the *Kale* decision and in the Special Inquiry Officer's report in this case, that possibility seems too theoretical and remote to call for a remand.

Affirmed.

Opinion of the United States Court of Appeals For the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,307

CHRIS DUNAT,

Appellant,

v.

JOHN W. HOLLAND, District Director of Immigration, Philadelphia

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 20, 1961.

Before: KALODNER, STALEY AND FORMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 29, 1961)

By STALEY, *Circuit Judge.*

This appeal requires us to determine whether the Attorney General correctly interpreted the applicable statutory standard in denying an application for stay of a deportation order and, upon our determination that he failed to do so, the power of this court in the matter.

Dunat, a Yugoslav seaman who jumped ship in Norfolk, Virginia, in 1956, applied to the Attorney General under the provisions of subsection 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)[1] for stay of an admittedly valid deportation order. Evidence was introduced in support of the application at a hearing before a special inquiry officer, where Dunat urged that he would be "physically persecuted" if deported to Yugoslavia since its Communist dominated government would deny him an opportunity to earn a livelihood because of his adherence to and practices of his Roman Catholic faith. The special inquiry officer's recommendation that a stay be denied was followed by the Regional Commissioner.

Dunat commenced an action in the district court for an indefinite stay of deportation, contending there, as he does here, that the Attorney General's action on his application was arbitrary and capricious and therefore constituted an abuse of discretion. In entering summary judgment in favor of the Attorney General and denying the stay, the district court concluded that "the applicant has been afforded all the rights he is entitled to, *i.e.*, the rights of procedural due process. [Citing case.] We cannot say that the alien's evidence was so strong that failure to withhold deportation amounts to a failure to consider the evidence." 183 F. Supp. 349, 351 (E.D.Pa., 1960). This appeal followed.

Recently, on February 2, 1961, this court had occasion in Blazina v. Bouchard, 286 F. 2d 507, to examine the role of the federal courts in reviewing a refusal by the Attorney General to grant a stay under subsection 243(h), 8 U. S. C. § 1253(h). We there said that an applicant has a right to have the application considered, and that such

[1] "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." § 243(h), 8 U. S. C. § 1253(h).

consideration must be given in conformity with the pertinent regulations promulgated by the Attorney General himself. The application may not be denied arbitrarily or capriciously, or be based on grounds that show a *disregard of the law.*

In denying Dunat's application, the Attorney General acting through his designees, said the following in construing the phrase "physical persecution": "The fact that the applicant might be denied employment for church membership or for failure to join the Communist Party is likewise not within the import of the term 'physical persecution'." We think that this was an erroneous interpretation of that phrase: Statutory construction is a question of law, Norton v. Warner Co., 321 U. S. 565 (1944), and such questions, Justice Frankfurter said in O'Leary v. Brown-Pacific-Maxon, Inc., 340 U. S. 504, 508 (1951), are "peculiarly appropriate for independent judicial ascertainment." On not infrequent occasions, statutory standards involved in deportation proceedings have been independently construed by the courts. *E.g.*, McGrath v. Kristensen, 340 U. S. 162 (1950) ("residing in the United States"); Fong Haw Tan v. Phelan, 333 U. S. 6 (1948) ("sentenced more than once"). There is no basis for thinking that Congress gave the Attorney General the exclusive right to interpret the statute. Furthermore, construction here does not require nor is it facilitated by any administrative expertise, a reason frequently given for judicial deference to an agency's interpretation of statutory language. The phrase "physical persecution" which is involved here is one that has a readily ascertainable meaning.

In *Blazina*, we defined "physical persecution" as meaning death, torture, or confinement inflicted on account of race, religion, or political viewpoint. Here, the Attorney General defined this phrase incorrectly by emphasizing, at

the expense of all else, the means used to bring about a result, rather than the result itself. To belittle economic sanctions regardless of their impact was, we think, to bypass the realities of everyday life. The statute does not concern itself with the manner in which physical persecution is inflicted, so long as that is the net effect of the forces or the circumstances that the Yugoslavian government will impose. Economic sanctions that may tend to lead to social ostracism, or "deny one an opportunity" to obtain and enjoy some of the social niceties and physical comforts certainly is not within the ambit of that phrase. However, there is no basis for thinking that "physical persecution" requires or even connotes the use of intense physical force applied to the body with all the dramatics of the rack and wheel. The denial of an opportunity to earn a livelihood in a country such as the one involved here is the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual. The result of both is the same, and it is one that Congress, motivated by the humanitarian instincts that have always characterized our conduct and that of our civilization, certainly hoped to avoid when subsection 243(h) was enacted.

The testimony adduced before the special inquiry officer established that if returned to Yugoslavia, Dunat will be "physically persecuted" because of his religious beliefs.[2]

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[2] Dunat's testimony in relevant part was as follows:

"Q. Are you a member of any recognized church?

"A. Yes.

"Q. And while in Yugoslavia did you attend church services?

"A. Under what I would call old Yugoslavia I attended church but under this new regime I did not because the idea was if I went to church I would not get work. Now my wife does attend

[Continued on page 32]

We have examined many decisions which reviewed the action of the Attorney General in refusing a stay under subsection 243(h) and other analogous provisions. We find them clearly inapposite, for there the courts were

[Continued from page 31]

church and my children for that reason are not able to obtain employment of any kind and I have to support them all.

* * *

"Q. Is it your testimony you have not attended church in Yugoslavia since the new regime took over Yugoslavia?

"A. I was home very little and, of course, as I said before, if I went to church I would lose my place on the list as far as work was concerned.

* * *

"Q. * * * Will you please tell me and explain in detail the basis for your claim that you would be subject to physical persecution in that country?

"A. As far as I know I am sure I would be jailed. Aside from that I am sure I would get no more employment so there is no other way to live and support my family. That much I am sure of. Also while I was on the ship any time I was on the ship I was always . . . they always tried to make me to become a member of the Communist Party. They always tried to work around but I always got out of it. I had to work. If I stayed on the ship I would lose my job because they knew I did not want to become a member and for that reason I can't go back. * * *

* * *

"Q. Were members of your family persecuted themselves because they refused to sign such papers? [Papers to the effect that signer was not a member of any church.]

"A. No, I would not say hurt physically but they refused to leave them to have any kind of work or means of support."

Reverend Anthony Cecich testified that he is presently Assistant Pastor of St. James Roman Catholic Church, Ventnor, New Jersey, was expelled from Yugoslavia by the Communists in 1943 and came to the United States in 1946 and further that he became an American citizen in 1952 and has frequent contact with individuals in Yugoslavia. His testimony in relevant part was as follows:

"Q. What has the attitude of Tito's government been on the Catholic worshippers you served from which Mr. Dunat comes

[Continued on page 33]

called on to determine whether the applicant had been afforded procedural due process, or that the Attorney Gen-

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[Continued from page 32]

and more specifically what are the economic and political results of practicing your Catholic religion in this section of the country?

"A. First, as active Catholic in Yugoslavia, outside your farming business, farming job, you are not allowed, never given an opportunity to have any other government job.

"Q. Just farming?

"A. Farming and your own farm. Second, position in the government, never could come for one who expresses . . . Catholics and go to church.

"Q. Could never get a government job?

"A. Could not get a government job. If any school teacher try to go to church, first thing lose job. Second thing will go voluntary work, without pay, without decent meals.

* * *

"Q. * * * What, if anything, would happen to a ship jumper like Mr. Dunat who failed to join the Communist Party aboard ship and whose family refused to sign a paper renouncing religion if he returned to Yugoslavia at the present time?

"A. In Yugoslavia never have job, family no job, persecuted all the time. Take job from him.

"Q. Would he be physically persecuted?

"A. I am sure physically persecuted because I know many of them who went back, put in jail, and physically persecuted. * * *

* * *

"Q. Has the government as a matter of practice refused employment to those who practice their religion?

"A. Generally everybody."

In addition, the testimony of Dr. Ivan Gunjanovich, formerly an Attorney General Deputy for Croatia, and Justice of the Court of Appeals in Novy Sod, Yugoslavia, and Professor Bogdan Raditsa, formerly Chief of Press Services in the Yugoslavia Embassy in Washington, and Chief of the Foreign Press Department under Tito, given in a similar but unrelated proceeding, was incorporated in the record and examined by the special inquiry officer. That testimony, as summarized without challenge in appellant's brief, clearly establishes beyond the pfeadvgiture of doubt, that a physical torture and inhumane treatment would greet Dunat upon his return to Yugoslavia as punishment for his desertion or retribution for his religious beliefs.

eral had abused his discretion in failing to give proper weight to evidence in the record.[3]

It is necessary to determine what disposition we shall make of Dunat's petition in light of our holding on the

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[3] Chao-Ling Wang v. Pilliod, 285 F. 2d 517 (C. A. 7, 1960); Cakmar v. Hoy, 265 F. 2d 59 (C. A. 9, 1959); Namkung v. Boyd, 226 F. 2d 385 (C. A. 9, 1955); United States ex rel. Dolenz v. Shaughnessy, 206 F. 2d 392 (C. A. 2, 1953); United States ex rel. Ratkovic v. Esperdy, 185 F. Supp. 806 (S. D. N. Y. 1960); Civadelic v. Bouchard, 185 F. Supp. 439 (D. N. J. 1960); United States ex rel. Miletic v. District Director of Immigration, 108 F. Supp. 719 (S. D. N. Y. 1952).

In the following cases it does not appear that any direct evidence was offered to show that the particular alien-applicant under subsection 243(h), 8 U. S. C. § 1253(h), would be "physically persecuted," and the only evidence offered from which that fact could be inferred was as follows:

Blazina v. Bouchard, — F. 2d —, (C. A. 3, 1961) (the court summarized the alien's fear as follows: "At worst, it appears that he will be 'looked down upon' and will encounter some 'complications.'")

Petrovic v. Pilliod, 282 F. 2d 877 (C. A. 7, 1960) (applicant was unwilling to serve in the Yugoslav Army and had denounced Communism during conversations with friends and acquaintances).

Obrenovic v. Pilliod, 282 F. 2d 874 (C. A. 7, 1960) (alien served with Chetniks during World War II, was arrested after that war, family tragedy suffered under Tito government, secured a passport surreptitiously, and authored an article on conditions in Yugoslavia).

Kam Ng v. Pilliod, 279 F. 2d 207 (C. A. 7, 1960), (water shortage in Hong Kong would endanger alien's health because of existing kidney condition).

United States ex rel. Cantisani v. Holton, 248 F. 2d 737 (C. A. 7, 1957) (alien was attacked by a group of Communists in 1942 in an Italian village to which his deportation was ordered).

Batistic v. Pilliod, 188 F. Supp. 344 (N. D. Ill. 1960) (fear of possible military service in Yugoslav Army including duty at an isolated station).

In Sunjka v. Esperdy, 182 F. Supp. 599, 601 (S. D. N. Y. 1960), the court said: "In sum, the evidence introduced by the plaintiffs establishes that they are practicing Roman Catholics and that they oppose Communism. This * * * does not permit the court to conclude that administrative discretion was abused. * * *."

merits. On several occasions courts after reviewing executive action under provisions similar to the one involved here have ordered that relief be granted to the alien identical to or the equivalent of that requested from the executive officer or agency. Such disposition took place not only where there was a failure to exercise discretion, Dickhoff v. Shaughnessy, 142 F. Supp. 555 (S. D. N. Y. 1956) (enforcement of deportation order enjoined and action remanded); Acosta v. Landon, 125 F. Supp. 434 (S. D. Calif. 1954) (release from detention ordered); but also where it was improperly exercised, Cheng Fu Sheng v. Barber, 269 F. 2d 497 (C. A. 9, 1959) (release from detention ordered); Sang Ryup Park v. Barber, 107 F. Supp. 603 (N. D. Calif. 1952) (enforcement of deportation order enjoined), and Sang Ryup Park v. Barber, 107 F. Supp. 605 (N. D. Calif. 1952) (release from detention ordered). The rationale of those decisions is that though a court may not suspend or stay a deportation order as that power is vested exclusively in an executive officer or agency, still as a condition precedent to the enforcement of such order, such officer or agency must entertain and exercise its discretion in the manner prescribed by Congress. See United States ex rel. Kasparian v. Hughes, 278 Fed. 262 (E.D.Pa. 1922); United States ex rel. Cavanaugh v. Howe, 235 Fed. 990 (S.D.N.Y. 1916).

Here, there are no issues of fact to be resolved, nor does it appear that the Attorney General in exercising his discretion as he did *relied* on evidence or factors that are not in the record before us. In this regard, we are fully aware, of course, that the Regional Commissioner, in making his determination, commented as follows:

> "I have also considered all the reliable additional information made available to me through official government channels, pertinent to the proper disposition of this application."

This does not indicate to us that such additional information was *relied* on by the Regional Commissioner nor that it was the basis for his action. In Jay v. Boyd, 351 U.S. 345, 360 (1956), the Supreme Court, in approving the use of undisclosed information, said:

> "We conclude that, although undisclosed information was used as a *basis* for denying suspension of deportation, none of the above-mentioned regulations was transgressed." (Emphasis supplied.)

Shortly after the Jay decision was handed down, General Joseph M. Swing, Immigration Commissioner then, and apparently at the time the instant application was disposed of (United States Government Organization Manual 1960-1961, p. 206), was quoted as saying that undisclosed information would be used only when "the most compelling reasons involving the national safety or security are present." General Swing also indicated that only he, as Commissioner, and not his subordinates, could certify that such urgency existed. New York Times, Nov. 4, 1956, § 4E, p. 12, col. 2. It is clear here that all questions arising out of Dunat's application were disposed of by the special inquiry officer and the Regional Commissioner, who are the Immigration Commissioner's subordinates. Unless we are to assume that these subordinates acted in contravention of the Commissioner's directions, there is no basis for concluding that in disposing of Dunat's application they relied on information not in the record. In any event, it is abundantly clear from the record before us that the Regional Commissioner gave the statutory phrase "physical persecution" the same erroneous construction as did the special inquiry officer and which, as pointed out heretofore, constituted an *error of law*.

All that remains for us is to apply a legal standard enacted by Congress and interpreted by the courts to the uncontradicted facts before us. See O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504. It is our conclusion that

an indefinite stay of deportation should be entered subject to changing circumstances, Dunat's deportation under other appropriate statutory provisions, and supervision over him by the Attorney General under subsection 242(d) of the Immigration and Nationality Act, 8 U.S.C. § 1252(d).

The judgment and order of the district court will be reversed and the cause remanded to that court for entry of an order not inconsistent with this opinion.

FORMAN, *Senior Judge, dissenting.*

Natural abhorrence for any governmental discrimination on account of race, religion or political opinion inclines one to concur with the majority. Adherence, however, to the well recognized doctrine that in the field of immigration and nationality, Congress has vested the executive branch of the Government with wide discretionary powers and that the scope of judicial review is closely circumscribed,[1] compels me to dissent.

The majority holds that the Attorney General through his Special Inquiry Officer erroneously interpreted the phrase "physical persecution" when the report of the latter was adopted, wherein he said, "The fact that the applicant might be denied employment for church membership or for failure to join the Communist Party is likewise not within the import of the term 'physical persecution'." The majority finds that the Attorney General thereby overlooked the economic reality that "(t)he denial of an opportunity to earn a livelihood in the country such as the one involved here is the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual."

The sentence quoted from the report of the Special Inquiry Officer, however, must be read in its context. The Officer was analyzing all of the testimony in the case in

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[1] United States ex rel. Leong Choy Moon v. Shaughnessy, 218 F. 2d 316, 318 (2 Cir. 1954); Chao-Ling Wang v. Pilliod, 285 F. 2d 517 (7 Cir. 1960); Blazina v. Bouchard, 286 F. 2d 507 (3 Cir. 1961).

its reflection of the claimed physical persecution in three aspects. He said:

> "An analysis of all the testimony in this case reflects that the claim of physical persecution has a three-fold aspect. First, the applicant fears loss of ability to obtain work and imprisonment because he jumped ship. Such a possible punishment is not the physical persecution contemplated by the statute. Physical persecution contemplates incarceration or subjection to corporal punishment, torture, or death based usually on one's race, religion or political opinion. Conviction followed by imprisonment for crimes cognizable as such under generally recognized civilized juridical systems, is not physical persecution.
>
> "Second, he alleges that he would be unable to obtain employment in Yugoslavia. As to this it might be stated that economic sanctions applied against those who are not members of the controlling clique in a country whose economic system is completely and rigidly state-controlled is not physical persecution. Therefore, there remains only for consideration the applicant's claim that he might be jailed because of the refusal of his family to join the Communist Party following requests upon him on board ship to do so. On the question of freedom of worship one item of evidence must not be overlooked and that is the testimony of the pastor who was a witness for the applicant that the Communists cannot stamp out the Catholic Church and that Catholics will and do find ways to worship even though they may be deprived of the ability to earn a living because of that.
>
> "It would appear established from various sources that the government of Yugoslavia is dominated and controlled by the Communist Party of that country and that the economic and political phil-

osophy of the country differs only in degree from that followed in the USSR and its satellite countries. Advancement in almost any line of activity is, with few exceptions, limited to Party members. The basic freedom to criticize, as we know and enjoy it, does not exist in Yugoslavia. On the other hand churches throughout the country are open for public worship and religious assembly and they are being maintained obviously with government permission, if not with its approval and support. The applicant's family has not been physically persecuted, within the meaning of that term, merely because his wife and two sons go to church, even though it should be established that they are denied *certain types of employment*. The fact that the applicant might be denied employment for church membership or for failure to join the Communist Party is likewise not within the import of the term 'physical persecution'. The applicant claims he may be jailed for failure to join the Communist Party pursuant to requests to do so while on board ship. It is clear, however, that he has returned to Yugoslavia on occasions after refusing to join the Communist Party prior to his last refusal and he was not imprisoned for it. His present statement that he feels he would be persecuted at this time is unsupported. He was not jailed before but was free to continue his calling as a crewman.

"From all of the testimony, as discussed above, it is believed that the applicant has failed to establish that he would be physically persecuted, as that term is contemplated in Section 243(h) of the Immigration and Nationality Act, if he were to return to Yugoslavia." (Emphasis supplied.) Report and Recommendation of Special Inquiry Officer, August 12, 1958.

It should be noted that it is the Regional Commissioner to whom the Attorney General has delegated the power to withhold deportation under § 243(h), 8 U.S.C. § 1253(h).[2]

The Regional Commissioner for the Southeast Region of the Immigration and Naturalization Service, in making his determination to deny appellant's application, commented as follows:

> "On October 31, 1956, pending receipt of official information which could assist in resolving the issues presented in such cases as this, other Yugoslav nationals in similar circumstances were granted a stay of deportation until January 1, 1958.[3]

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[2] The pertinent administrative regulation reads in part:

"(2) If the request for a stay of deportation is predicated upon a claim by the alien that he would be subject to physical persecution if deported to the country designated by the Service, he shall be requested, upon notice, to appear before a special inquiry officer for interrogation under oath. The alien may have present with him, at his own expense, during the interrogation any attorney or representative authorized to practice before the Service. The alien may submit any evidence in support of his claim which he believes should be considered by the special inquiry officer. Upon completion of the interrogation, the special inquiry officer shall prepare a written memorandum of his findings and a recommendation which shall be forwarded to the regional commissioner, together with all the evidence and information submitted by the alien or which may be applicable to the case."

* * *

"The decision whether to withhold deportation and, if so, for what period of time shall be finally made by the regional commissioner upon consideration of all the evidence submitted by the alien and any other pertinent evidence or available information." 8 C. F. R. 243.3(b)(2); Chao-Lang Wang v. Pilliod, 285 F. 2d 517 (7 Cir. 1960).

[3] See The Matter of Kale, A9 555 532, decided by the Assistant Commissioner of the Enforcement Division of the Immigration and Naturalization Service, April 23, 1958, referred to in Dombrovski, et al. v. Esperdy, — F. Supp. — (S. D. N. Y. March 13, 1961) and Batistic v. Pilliod, 188 F. Supp. 344 (N. D. Ill. 1960), aff'd 286 F. 2d 268 (7 Cir. 1961).

"I have carefully reviewed the transcript of the interrogation of the applicant, the evidence he has submitted for consideration, the findings and recommendations in the matter of the Special Inquiry Officer; and the representations made by the applicant's counsel.

"*I have considered all the available additional information made available to me through official government channels, pertinent to the proper disposition of this application.*

"Upon consideration of all the pertinent information at hand, there are, in my opinion, insufficient grounds to support a finding that the applicant would be subject to physical persecution if deported to Yugoslavia; therefore, his deportation should not be withheld under Section 243(h) of the Immigration and Nationality Act." (Emphasis supplied.) Order Denying Application under 243(h) of August 20, 1958.

Subsequently the proceedings were reopened at the request of the appellant for the introduction of additional testimony before the same Special Inquiry Officer. He reported upon the additional evidence and reiterated his recommendation that the application should be denied. The report and recommendation came before a successor Regional Commissioner who denied the application in the following language:

"An interrogation on the application for withholding of deportation was conducted at Philadelphia, Penna., on August 11, 1958. The Special Inquiry Officer who conducted the interrogation recommended that the application be denied. The Regional Commissioner concurred in this recommendation, and on August 20, 1958 ordered that the application for withholding of deportation be denied.

"Upon motion of Counsel the interrogation was ordered reopened by the Regional Commissioner on November 19, 1959 to permit the introduction of additional evidence. The reopened interrogation was conducted in Philadelphia, Penna., on January 5, 1960. The Special Inquiry Officer who conducted the reopened interrogation has recommended that the application be denied.

"The additional evidence which was submitted at the reopened interrogation has been adequately discussed in the recommendation of the Special Inquiry Officer, and has been carefully reviewed and considered. It is my opinion that the applicant has failed to establish that he would be subject to physical persecution if he returned to Yugoslavia.

"The findings and the recommendations of the Special Inquiry Officer will be approved, and stay of deportation will be denied." Order denying stay of deportation of February 26, 1960.

The majority ignores the findings of the Regional Commissioner as a whole and places too heavy an emphasis upon the single sentence in the report of the Special Inquiry Officer—"The fact that the applicant might be denied employment for church membership or for failure to join the Communist Party is likewise not within the import of the term 'physical persecution'." Particularly that sentence must be read with the one preceding it—"The applicant's family has not been physically persecuted, within the meaning of that term, merely because his wife and two sons go to church, even though it should be established that they are denied *certain types of employment.*" (Emphasis supplied.) When so read the words "might be denied employment" in the offending sentence are similarly restricted to "certain types of employment".

It is true that the evidence offered by appellant to the Special Inquiry Officer was to the effect that economic

sanctions were leveled at those who adhered to the Catholic faith and declined membership in the Communist Party by precluding them from holding government jobs. Granted that most employment in Yugoslavia is governmentally controlled there is nothing in the evidence to support the conclusion that Catholics and political dissenters were precluded from *all* forms of employment and that it must necessarily follow that they slowly starve to death. Of course if this were so it would indeed constitute "physical persecution". But apparently the Attorney General was not so persuaded from the evidence offered by the appellant as he weighed it against the information that was available to him.[4]

[4] In United States ex rel. Dolenz v. Shaughnessy, 206 F. 2d 392, 394-395 (2 Cir. 1953) the court said:

"That section modifies the language of the former statute in a manner which shows clearly, we think, that the withholding of deportation in cases where the alien fears persecution rests wholly in the administrative judgment and 'opinion' of the Attorney General or his delegate. The courts may not substitute their judgment for his. Doubtless a court might intervene to stay deportation, if the Attorney General or his delegate should deny the alien any opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien. *But we see nothing in the statute to suggest that the courts may insist that the Attorney General's opinion be based solely on evidence which is disclosed to the alien. In his official capacity the Attorney General has access to confidential information derived from the State Department or other intelligence services of the Government which may be of great assistance to him in making his decision as to the likelihood of physical persecution of the alien in the country to which he is to be deported. We believe Congress intended the Attorney General to use whatever information he has.* To preclude his use of confidential information unless he is willing to disclose it to the alien would defeat this purpose. Moreover, the very nature of the decision he must make concerning what the foreign country is likely to do is a political issue into which the courts should not intrude. As was said in Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U. S. 103, 111, 68 S. Ct. 431, 436, 92 L. Ed. 568: 'But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.'" (Emphasis supplied.)

Only in the Attorney General did Congress vest the power under § 243(h) of the Immigration and Nationality Act to stay a valid order of deportation when in *his* opinion that deportation would subject an alien to physical persecution. That power was substantially broadened in the 1952 Immigration and Nationality Act.[5] Here, ample, even generous, opportunity was granted appellant to place his application for stay before the Attorney General and it was given consideration in accordance with the statute and the regulation thereunder. Procedural due process and a fair consideration of his application was accorded to him, for the lack of which, only, is court intervention permissible.

In proceedings involving applications for suspension of deportation under § 244(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1254(a), certainly more formal and prescribed, than those now under review, it has been held that the Attorney General's power to grant or deny suspension is a dispensing power, a matter of grace not right, comparable to the power of a judge to

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[5] This is made clear in United States ex rel. Leong Choy Moon v. Shaughnessy, 218 F. 2d 316, 318 (2 Cir. 1954), where the court stated:

". . . In particular, we have held that under § 243(h) the question of whether deportation should be withheld because an alien fears persecution rests solely with the Attorney General or his delegate. United States ex rel. Dolenz v. Shaughnessy, 2 Cir., 1953, 206 F. 2d 392. We there pointed out that whereas the comparable section in the predecessor statute, § 23, Internal Security Act of 1950, 64 Stat. 1010, required withholding the deportation of any alien to any country in which the Attorney General 'shall find' that such alien would be subjected to physical persecution, present § 243(h) modified that provision so as simply to authorize the Attorney General to withhold deportation to any country in which 'in his opinion' the alien would be subjected to such persecution. We found in this change of language a clear indication that Congress intended the withholding of deportation in such circumstances to rest 'wholly in the administrative judgment and "opinion" of the Attorney General or his delegate.' United States ex rel. Dolenz v. Shaughnessy, supra, 206 F. 2d at page 394 . . ."

suspend the execution of a sentence or the President to pardon a convict.[6]

I cannot agree with the majority that the failure to grant the stay of deportation was arbitrary and capricious in view of the evidence presented by the appellant, the information available to the Attorney General and the discretion vested in him by Congress. On the contrary I am convinced that he acted well within the power vested in him and that a reversal of his decision substitutes the judgment of the court for his opinion.

I would affirm the judgment and order of the district court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[6] Jay v. Boyd, 351 U. S. 345, 354 (1956); U. S. ex rel. Kaloudis v. Shaughnessy, 180 F. 2d 489, 491 (2 Cir. 1950).

Opinion of the United States Court of Appeals For the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,307

CHRIS DUNAT,

Appellant,

v.

L. W. HURNEY, DISTRICT DIRECTOR OF IMMIGRATION, PHILADELPHIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Reargued November 14, 1961

Before BIGGS, *Chief Judge*, and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY and SMITH, *Circuit Judges*.

OPINION OF THE COURT

(Filed January 24, 1962)

PER CURIAM.

Four members of the court agree fully with the views expressed by the majority of the panel which first heard

this case; four do not. However, all of us agree, contrary to what seems to have been the position of the Attorney General during administrative consideration of this case, that economic proscription so severe as to deprive a person of all means of earning a livelihood may amount to physical persecution. On reargument this position was conceded by the government.

In the circumstances we all agree that the judgment of the district court must be reversed, deportation stayed, and the cause remanded to the Attorney General. However, the Attorney General will be free, as indicated in the opinion on first argument, to reopen the case for further consideration based upon additional evidence and information not heretofore considered.

It will be so ORDERED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Recommendation by Special Inquiry Officer

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

File: A 11 077 017 New York District

Apr 30 1959

MEMORANDUM AND RECOMMENDATION OF SPECIAL INQUIRY OFFICER

in the case of

GRAZIANO DIMINICH

Applicant for Relief under Section 243(h) of the Immigration and Nationality Act

IN BEHALF OF APPLICANT: Anton G. Sintich, Esq.

135 East 38th Street
New York, N.Y.

DISCUSSION: The applicant is 20 years of age, an unmarried male alien, a native and national of Yugoslavia. He last arrived in the United States at New York, N.Y., on October 15, 1957, when he was admitted as a nonimmigrant crewman. On April 9, 1959 a warrant was issued directing his deportation under Section 241(a)(2) of the Immigration and Nationality Act on the ground that he had remained in the United States for a longer time than permitted.

On April 10, 1959 the applicant applied for relief under Section 243(h) of the Act. In an affidavit executed by him under oath on April 8, 1959, he alleged that he fears persecution in Yugoslavia on account of his religious and

political belief; that he was born in the province of Pola, Istria, which originally was Italian territory but which is now an integral part of Yugoslavia; that following his preliminary education, he secured employment on Yugoslav vessels navigating in the Mediterranean and that during such employment he was continuously indoctrinated in communism and Godlessness. In September, 1956 he escaped from his vessel at an Italian port and surrendered himself to the Italian authorities. He requested political asylum in Italy. Following an investigation, he was recognized as a political refugee from Yugoslavia and was issued a document to that effect as well as an international passport. Thereafter he obtained employment on a Danish vessel, the steamship ANNA MAERSK, which came to the United States on two occasions, his last arrival occurring on October 15, 1957.

He further alleged that while in the United States he has on numerous occasions expressed his opposition to communism and totalitarianism in general; that if he is returned to Yugoslavia, he has every reason to believe that he would be severely punished, imprisoned and maltreated because he escaped from Yugoslavia and expressed his views against the communist regime.

The applicant appeared before the undersigned on April 15, 1959 and testified in support of his application. He reaffirmed the allegations contained in his affidavit of April 8, 1959. He attended school in Yugoslavia for about eight years. In October, 1955 he started to work as a crewman on Yugoslav vessels sailing to ports in Northern Europe. In November, 1956 he deserted his vessel at an Italian port and remained in Italy until July 11, 1957.

While in Italy he stayed in various refugee camps and was recognized by the Italian authorities as a political refugee from Yugoslavia. He testified that he abandoned his ship in Italy because he was being urged every day to join the Communist Party and to attend Communist Party meetings on the vessel, but that he did not wish to do so; that he is a Catholic and always attended the Catholic church in his native town, but that during his employment on Yugoslav vessels, he attended church only when no one saw him because he was afraid he would lose his job if discovered attending church services.

While in the refugee camps in Italy, and while in the United States, according to his testimony, he always expressed himself freely as being opposed to the communists. He feared that some of the people in the refugee camps may have reported his statements to the Yugoslav authorities.

In Yugoslavia the applicant has his parents and three brothers. Neither he nor any member of his family has ever been arrested by the police or in trouble with the authorities in Yugoslavia. He claims, however, that the communists killed an uncle of his in 1945 because of his opposition to the communists but admits that he, the applicant, was never punished or discriminated against because of the fact that his uncle had been killed by the communists in 1945. He also admits that he was never deprived of an opportunity to earn a living in Yugoslavia.

The applicant expressed the opinion that if he returns to Yugoslavia, he would be imprisoned for as long as two years because he deserted his vessel in Italy.

Upon the request of applicant's counsel, the examination was adjourned until April 22, 1959, to permit the applicant to locate witnesses who might testify in his behalf. On the latter date, a further adjournment of one week was requested and this application was granted by the special inquiry officer because it appeared that the applicant had been in Service custody until April 22, 1959, and therefore

was not able to locate his witnesses. Accordingly, the examination was adjourned until April 29, 1959. On that day the special inquiry officer received a letter from applicant's counsel, dated April 28, 1959, stating that the applicant had been unable to locate the required witnesses and counsel requested that the special inquiry officer consider the case on the merits, taking into consideration the testimony given by the applicant.

The applicant's testimony has not been corroborated in any way. Reference is made to an article appearing in the New York Times August 17, 1958, page 28, written by Paul Underwood at Belgrade, Yugoslavia, with respect to conditions in Yugoslavia. It appears therein that conditions in Yugoslavia have greatly improved in recent years and that the government of Yugoslavia does not persecute the ordinary individual solely because he criticizes the communist regime.

It may be assumed that the applicant would be punished in Yugoslavia for deserting his vessel in Italy in 1956, but there is no indication that such punishment would be cruel or inhuman. The applicant admits that he was never deprived in Yugoslavia of an opportunity to earn a living. His claim that he might be denied employment because of his attending church services is not supported by any evidence. Under the circumstances, it is concluded that the application should be denied for failure of proof.

RECOMMENDATION: It is recommended that the application of Graziano Diminich to withhold deportation to Yugoslavia under Section 243(h) of the Immigration and Nationality Act be denied on the ground that he has not established that he would be subject to physical persecution if so deported.

REUBEN SPEISER
Reuben Speiser
Special Inquiry Officer

ebt

Attorney General's Order Denying Section 243(h) Relief

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

Burlington, Vermont

File No.: A9 825 288 May 27, 1959

In Re: GRAZIANO DIMINICH

PROCEEDINGS UNDER SECTION 243(h) OF THE IMMIGRATION AND NATIONALITY ACT

IN BEHALF OF APPLICANT: Anton G. Sintich, Esq.
135 East 38th Street
New York, New York

Upon consideration of all of the evidence submitted by the alien, representations of counsel, and other pertinent evidence and available information, it is not my opinion that the applicant would be subject to physical persecution if deported to Yugoslavia, and his application will be denied.

ORDER: It is ordered that the application for withholding of deportation to Yugoslavia pursuant to Section 243(h) of the Immigration and Nationality Act be denied.

CHARLES C. DAVIE
Regional Comissioner